

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Ruling

Defense Request to
File Ex Parte Supplement

15 March 2012

Defense moves this Court to consider an *ex parte* supplement to its Motion to Compel Discovery. The Government opposes. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Factual Findings.

1. On 14 February 2012, the defense submitted motions to the Court and the Government, to include an *ex parte* supplement to its Motion to Compel Discovery.
2. On 15 February 2012, the Court, via email, requested the Defense to provide authority for the Court to consider the *ex parte supplement*. Also via email on 15 February 2012, the Defense provided the following authority that is also contained in the *ex parte* supplement.

The Defense, in unusual situations is entitled to an ex parte hearing to justify a motion for appropriate relief. United States v. Garries, 22 MJ 288, 291 (C.M.A. 1986) (recognizing the inherent authority in the military judge to permit an ex parte proceeding in the unusual circumstance where it is necessary to ensure a fair trial); United States v. Kaspers, 47 MJ 176 (C.A.A.F. 1997) (holding that a military judge has broad discretion to protect the rights of the military accused to include conducting an ex parte hearing). In the instant case, the Defense is not requesting an ex parte hearing. Instead, the Defense simply desires to present the Court with an ex parte supplement to its motion to compel discovery.

Due to the Government's refusal to provide the requested discovery, the Defense is placed in the position of having to disclose, to a partisan opponent, why it believes certain evidence is relevant and should be produced for trial. If the Defense is required to disclose its theory of relevance, the Government will receive an advance notice of the defense's theory and the opportunity to prepare to rebut and counter the requested discovery. The Government simply has to refuse to provide requested discovery in order to force the Defense to stand in open court and explain how each request is relevant and necessary. In meeting this challenge, the Defense is forced to explain why the requested discovery is needed, how the requested discovery is relevant to a fact in issue, and why the requested

discovery is necessary to the Defense. In doing so, the Defense must balance how much of its trial strategy it will disclose to justify the production of the requested discovery. This mandated disclosure of the Defense's case theory provides an unfair advantage to the Government.

In order to avoid this unfair advantage, the Defense believes that this is one of those unusual situations where an *ex parte* hearing would be appropriate. United States v. Garries, 22 MJ 288, 291 (C.M.A. 1986); United States v. Kaspers, 47 MJ 176 (C.A.A.F. 1997).

3. On 23 February 2012, the Defense filed its *ex parte* submission under seal as AE IX. The Court asked the Government if it objected to the *ex parte* submission. The Government advised the Court it did not object. At the arraignment, the Government learned that it had not received emails from the Court and from the Defense sent prior to arraignment.

4. After arraignment, the Government learned it had experienced email server problems and had not received emails from the Defense or the Court between 14 February and 23 February 2012.

5. On 24 February 2012, the Government received the emails that it had not received from the defense and the Court between 14 and 23 February 2012. The same day the Government received the above email, the prosecution emailed the Court and requested the opportunity to object. Also on 24 February 2012, the Defense sent the Court emails from the Government dated 15 and 16 February 2012 indicating they knew the Defense was filing an Ex Parte supplement. The Government renewed their request for reconsideration at the telephonic RCM 802 conference held on 6 March 2012.

The Law:

1. There is no express authority in RCM 701 (Discovery) for the Court to consider *ex parte* filings by the Defense when determining whether evidence is relevant, material, or favorable to the defense. RCM 701(g)(2) (Protective and Modifying Orders) does authorize the Court to allow *ex parte* showings by either party when moving the Court to restrict or limit discovery. There is also no express authority in RCM 703 (Production of Witnesses and Evidence) for the Court to consider *ex parte* filings by the defense. RCM 703(f)(3) states, "any defense request for the production of evidence . . . shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence."

2. The Court of Appeals for the Armed Forces in United States v. Garries, 22 M.J. 288, 291 (CMA 1986) and United States v. Kaspers, 47 M.J. 176 (CAAF 1997) recognized, that although an accused has no right to an *ex parte* hearing, military courts have inherent authority to grant the accused an *ex parte* hearing to demonstrate relevance and necessity for an expert witness under RCM 703(d) if the circumstances are unusual.

3. This case involves an *ex parte* supplement rather than an *ex parte* hearing and the *ex parte* supplement is in furtherance of a motion to compel discovery rather than a motion to compel an

expert witness. Thus, it is an open question whether the Court has inherent authority to consider an *ex parte* supplement from the Defense in furtherance of a motion to compel discovery under RCM 701 or a motion to produce evidence under RCM 703.

Analysis:

1. Although the Government was aware the Defense intended to file an *ex parte* submission in support of its Motion to Compel Discovery before 23 February 2012, when it informed the Court it had no objection to the *ex parte* submission, the Government had not received the 15 February 2012 email from the Defense setting forth authority for the filing. Under these circumstances, the Court will allow the Government to respond and will reconsider its ruling.
2. Assuming the Court does have inherent authority to consider an *ex parte* filing by the Defense in support of a motion to compel discovery, the Court has examined the Defense's *ex parte* submission to determine whether it demonstrates unusual circumstances. The Court finds none.
3. The parties disagree on whether the motion to compel discovery involves discovery under RCM 701 (requiring the Court to make findings of relevance, materiality, and whether potentially discoverable information is favorable to the defense and material to guilt or punishment) or production of evidence under RCM 703 (requiring the Court to make findings of relevance and necessity). In either case, the position of the parties for such initial determinations should be made on the record.
4. This case involves classified information. Should the Court determine that any of the information or evidence in the motion to Compel is discoverable by the Defense, the Government may invoke the privilege for classified information in MRE 505 and move the Court to conduct an *in camera* review. Should that occur, the Defense may renew its request for the Court to consider its *ex parte* supplement when conducting *in camera* review.

RULING: The Government motion to reconsider is **GRANTED**. The Defense Motion for the Court to consider the *ex parte* supplement is **DENIED**.

ORDERED this 15th day of March 2012.



DENISE R. LIND

COL, JA

Chief Judge, 1st Judicial Circuit